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91-1703

Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

OCTOBER TERM, 1991

NO. 92-1703

DENNIS C. HALL,

Petitioner

v.

GEORGIA,

Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i.

TABLE OF AUTHORITIES ..... ii.

STATEMENT OF THE CASE..... 1

QUESTIONS PRESENTED 5

REASONS FOR DENYING THE PETITION..... 6

I. THE TRIAL COURT SUFFICIENTLY TESTED THE VALIDITY OF THE PROSECUTION'S EXPLANATIONS FOR ITS USE OF PEREMPTORY CHALLENGES AGAINST SIX BLACK JURORS AND FOUND THAT THE PROSECUTOR DID NOT IMPERMISSIBLY USE HIS PEREMPTORY CHALLENGES TO REMOVE SIX BLACK JURORS WHERE RACE NEUTRAL BASES FOR THE STRIKES WERE ARTICULATED AS REQUIRED BY THIS COURT IN *BATSON*.....6

II. THE GEORGIA SUPREME COURT CONSTITUTIONALLY APPLIED THE DEPRAVITY OF MIND PROVISION OF THE GEORGIA DEATH PENALTY STATUTE AS THIS CASE LIES WELL WITHIN THE "CORE" OF CASES WHICH ALLOW A FINDING THAT THE MURDER WAS SUFFICIENTLY DEPRAVED SO THAT THE DEATH PENALTY MAY BE IMPOSED..... 11

III. NO CONFLICT EXISTS BETWEEN THE GEORGIA SUPREME COURT AND THIS COURT AS THE GEORGIA COURT DID NOT AFFIRM THE DEATH SENTENCE ON GROUNDS OTHER THAN THOSE RELIED UPON BY THE JURY IN THIS CASE... 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: Page

Batson v. Kentucky, 476 U.S. 79 (1986).....2, 6, 7, 10
Godfrey v. Georgia, 446 U.S. 420 (1980) 12, 15, 19
Gregg v. Georgia, 428 U.S. 153, 188 (1976).....11, 15, 17
Hernandez v. New York,
____U.S. ____, 111 S.Ct. 1859 (1991).....7
Presnell v. Georgia, 439 U.S. 14 (1978) 17, 18
Burger v. Zant, 718 F. 2d 979 (11th Cir. 1983) 13, 14
Splunge v. Clark, 1992 WL 67148 (7th Cir.) 8
Williams v. Chrans, 957 F. 2d 487 (7th Cir. 1992);.....8
United States v. Pulgarin, 955 F.2d 1 (1st Cir. 1992).....8
United States v. Stavroulakis,
952 F.2d 686 (2d Cir. 1991) 8, 9
United States v. Casper, 956 F.2d 416 (3d Cir. 1992).....8
United States v. Hinojosa,
958 F.2d 624 (5th Cir. 1992).....8
United States v. King, 1992 WL 88555 (6th Cir.).....8
United States v. Todd, 1992 WL 85143 (8th Cir.).....8
United States v. Bishop, 1992 WL 55078 (9th Cir.) 8
United States v. Johnson,
941 F.2d 1102 (10th Cir. 1991).....8
Black v. State, 261 Ga. 719 (1991)..... 18
Brown v. State, 247 Ga. 298 (1981) 13

Brown v. State, 254 Ga 83,
cert. denied 474 U.S. 865 (1985) 18
Dampier v. State, 245 Ga. 882,
cert. denied, 449 U.S. 938 (1980) 13, 15, 16
Foster v. State, 736 Ga. 325 (1987) 9
Gamble v. State, 257 Ga. 325 (1987) 7, 9
Gilreath v. State, 247 Ga. 814 (1981),
cert. denied, 456 U.S. 984 (1982) 16
Hall v. State, 1991 WL 255007 ..... 4, 14, 19
Hance v. State, 245 Ga. 856,
cert. denied, 449 U.S. 1067 (1980) 12, 13, 19
Harris v. State, 237 Ga. 718 (1976),
cert. denied, 431 U.S. 933 (1977) 15, 16
Jarrell v. State, 261 Ga. 880 (1991) 18
Patrick v. State, 247 Ga. 168 (1981) 18
Phillips v. State, 250 Ga. 336, 340 (1982) 13, 14
Romine v. State, 251 Ga. 208 (1983) 18

Statutes:

O.C.G.A. § 17-10-30 (b) (7) 11, 15, 17
O.C.G.A. § 17-5-31 17

STATEMENT OF THE CASE

Dennis Hall, Petitioner, is married to Sheila Ruth Hall and is the father of three children, Adrian, Kenyata and Sheketta Hall. Transcript at 669.[1] Petitioner has a history of domestic violence, particularly when he has been drinking alcohol. T. at 525-31, 701. On January 7, 1990, an argument began between Petitioner and his family. Petitioner had been drinking over the course of the day, and started an argument with his ten year-old son, Adrian, over the television interference caused by Adrian's remote control tractor. T. 679. Petitioner slapped his son across the back of the head after his son continued to play with the tractor; the severity of this blow caused an argument between Petitioner and his wife. T. 679-680.

During this argument, Petitioner ran into a bedroom and got an unloaded shotgun which the family kept under the bed. Sheila, Petitioner's wife, was able to take the shotgun away from Petitioner and gave it to her daughter to lock-up in the car outside. T. 718, 786. Petitioner then attempted to get a pistol from his wife, but she took that away from Petitioner as well and similarly gave it to Adrian to take outside. T. 273.

Petitioner, however, followed his children outside and took the shotgun away from his daughter and the pistol away from his son. T. 725. Despite a struggle with his wife for possession of the gun, Petitioner loaded the shotgun with shells from his picket and pointed it at his ten year-old son, Adrian. T. 388,

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[1] Hereinafter, T. _____.

407-410, 786. Adrian begged Petitioner not to shoot him, but Petitioner fired a shot into Adrian's chest and walked away. T. 388, 411-412.

A few minutes later, after his son was dead, Petitioner came out of his home, kissed his son and told the boy he loved him. He then told a neighbor that "shit happens" and that Petitioner "couldn't learn him nothing by beating him with a belt, so I guess I learned him something this time." T. 413. After the arrival of the police, Petitioner was tested for intoxication; his blood alcohol level registered .32 percent. T. 543.

Petitioner was arrested and charged with malice murder, felony murder, two counts of cruelty to children and discharging a firearm near a public street. Voire dire at the trial began in August 1990. All of the six blacks in the jury pool were struck by the prosecutor using peremptory challenges, and Petitioner objected on the basis of *Batson v. Kentucky*, 476 U.S. 79 (1986). The prosecutor responded by explaining all of the reasons for each peremptory strike.

He explained his peremptory strikes of the black jurors as follows. Vero Morrow, the second juror struck, was a close friend of Petitioner's family as well as the family which retained counsel for Petitioner and two defense witnesses. In fact, Ms. Morrow later assisted defense counsel in selecting jurors. T. 212-214, 310, 738, 1041. Arnella Cap, who testified that she had know and had made excuses for Petitioner all his life, was the third juror struck. T. 130-133, 311. Emma Hunter, another

friend of Petitioner's family, was the fourth juror struck; her stepson had been arrested at one time, and there was evidence that she would not be able to impose the death penalty if placed on a jury. T. 107, 118, 311-312. Eva Morrow was the seventh juror struck. She was a black woman who knew Petitioner's mother but who attempted to deceive the prosecutor of that fact. She also was related to four persons who had been prosecuted by the prosecutor in this case. T. 210-214, 313-305. Dexter Hillman, the ninth juror struck, was another close friend of Petitioner's family who admitted that he would favor Petitioner and would have difficulty deciding the case because of his feelings. T. 164-165, 167-168, 316. Finally, Cathy Simmons was struck at the last minute because she, too, knew Petitioner's mother and was observed entering the courtroom with his family and sitting directly behind them. T.217-218, 234, 250-251, 316-323.

There were also four white jurors struck for similar reasons in Petitioner's trial. In fact, the first juror struck was a white male with a history of domestic problems. T. 309-310. The fifth juror struck, Dana Casper, was a white woman whose father had been arrested and charged with manslaughter. T. 118-119, 312. Harold Martin, a white male, was the sixth juror struck because he had accidentally shot himself in the past and the prosecutor reasoned that he could improperly bring this experience to bear on the other jurors. T. 313. The eighth juror struck, Joseph Brandenburg, was a white juror whom the

prosecutor felt would not be able to understand the issues involved. T. 316.

The trial court accepted the prosecutor's explanations for the use of the peremptory strikes, noting that under Batson the State has a burden of enunciating race-neutral explanations. The explanations offered by the prosecutor in Petitioner's case met that burden. The court further explained its decision with the comment that it had never had a problem with this prosecutor using peremptory challenges in a discriminatory maner.

After the trial, the jury returned a guilty verdict on all courts. At the sentencing phase the jury was instructed that it could only impose the death penalty if it found at least one aggravating circumstance; specifically, it must find that the murder was outrageously or wantonly vile, horrible or inhuman, and demonstrated depravity of mind or torture. T. 1116-1119. Following these instructions and some argument by the attorneys, the jury recommended the death penalty under O.C.G.A. § 17-10-30 (b) (7). The jury verdict in the case stated:

> "We the jury find the following aggravating circumstances to exist beyond a reasonable doubt: wantonly vile, depravity of mind, horrible, inhuman in that it involved torture."

Petitioner appealed to the Georgia Supreme Court on nineteen different grounds. The Georgia Supreme Court affirmed the conviction and the death sentence. *Hall v. State*, 1991 WL 255007. The majority rejected Petitioner's argument that the prosecutor impermissibly used peremptory challenges to remove black jurors from the jury. It found that the explanations

offered at the trial level were both race-neutral and persuasive enough to rebut the prima facie case established by Petitioner. Further, the majority rejected Petitioner's argument that the death penalty was improperly imposed. Two justices found that the evidence at trial was sufficient to find both mental torture and depravity of mind. Two other justices concurred on the grounds that the evidence was sufficient to show depravity of mind and did not consider the evidence of torture. The three justice dissent, however, rejected the imposition of the death penalty based solely on O.C.G.A. § 17-10-30 (b) (7) and argued that there was insufficient evidence to show either torture or depravity of mind.

Petitioner now brings this petition for writ of certiorari to this Court for consideration of three questions.

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT SUFFICIENTLY TESTED THE VALIDITY OF THE PROSECUTION'S EXPLANATIONS FOR ITS USE OF PEREMPTORY CHALLENGES AGAINST SIX BLACK JURORS GIVEN THAT THE TRIAL COURT FOUND THAT THE PROSECUTOR DID NOT IMPERMISSIBLY USE HIS PEREMPTORY CHALLENGES TO REMOVE SIX BLACK JURORS WHERE RACE NEUTRAL BASES FOR THE STRIKES WERE ARTICULATED AS REQUIRED BY THIS COURT IN BATSON.

II. WHETHER THE GEORGIA SUPREME COURT CONSTITUTIONALLY APPLIED THE DEPRAVITY OF MIND PROVISION OF THE GEORGIA DEATH PENALTY STATUTE WHERE THIS CASE LIES WELL WITHIN THE "CORE" OF

CASES WHICH ALLOW A FINDING THAT THE MURDER WAS SUFFICIENTLY DEPRAVED SO THAT THE DEATH PENALTY MAY BE IMPOSED.

III. WHETHER A CONFLICT EXISTS BETWEEN THE GEORGIA SUPREME COURT AND THIS COURT WHERE THE GEORGIA COURT DID NOT AFFIRM THE DEATH SENTENCE ON GROUNDS OTHER THAN THOSE RELIED UPON BY THE JURY IN THIS CASE.

REASONS FOR DENYING THE PETITION

I. THE TRIAL COURT SUFFICIENTLY TESTED THE VALIDITY OF THE PROSECUTION'S EXPLANATIONS FOR ITS USE OF PEREMPTORY CHALLENGES AGAINST SIX BLACK JURORS AND FOUND THAT THE PROSECUTOR DID NOT IMPERMISSIBLY USE HIS PEREMPTORY CHALLENGES TO REMOVE SIX BLACK JURORS WHERE RACE NEUTRAL BASES FOR THE STRIKES WERE ARTICULATED AS REQUIRED BY THIS COURT IN *BATSON*.

This Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), upheld a defendant's right to be tried by a jury whose members were selected under non-discriminatory criteria. In order to ensure this right under *Batson*, a defendant may make out a prima facie case by showing that he is a member of a "cognizable" race and that peremptory challenges were used to exclude members of that race. *Id.* at 96. The burden then shifts to the State to

demonstrate race-neutral explanations which led to the use of the peremptory challenge. *Id.* at 97. Finally, the trial court has the duty to evaluate the prosecutor's offered reasons and determine if the defendant has established purposeful discrimination. *Id.* at 98.[2]

Recently, this Court has readdressed *Batson*. In *Hernandez v. New York*, ____ U.S. ____, 111 S.Ct. 1859 (1991), the Court was confronted squarely with the question of what was a "race-neutral" explanation. This Court stated clearly in *Hernandez* that "[a] neutral explanation . . . means an explanation based on something other than the race of the juror." *Id.* at 1866. Disproportionate impact on jurors of a certain race is not sufficient, in and of itself, to establish purposeful discrimination in violation of *Batson*. This disparate impact, however, may be used by the trial judge to evaluate the prosecutor's offered reasons. Id. at 1868. In addition, this Court in *Hernandez* reemphasized the policy of deference to the trial court in any *Batson* case and stated that "[d]eference to trial court findings on the issue of discriminatory intent makes particular sense in this context because . . . the finding will 'largely turn on evaluation of credibility'." *Id.* at 1869; *see also*, *Batson* at 98, n.21.

Batson and its progeny established a clear test for racially motivated challenges. These cases lightened the burden on a

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[2] *Batson* and its three part test was adopted by the Georgia Supreme Court in *Gamble v. State*, 257 Ga. 325 (1987).

defendant attempting to assert racial bias and required prosecutors to respond with evidence of non-racial motive. The ultimate *Batson* decision, however, was left to the trial court's discretion. Petitioner asserts that this discretion has created a conflict between lower courts as to the level of inquiry which should be made by trial judges. In support of this, Petitioner points to two circuits and two state supreme courts which require, in addition to facially non-racial explanations, specific factual findings concerning the treatment of similarly situated black and white jurors.

Despite Petitioner's arguments, however, the majority of court have not imposed any such requirement[3] although findings of disparate treatment may be used as evidence in a trial court's determination of credibility. For example, the Seventh Circuit, in *Splunge v. Clark*, 1992 WL 67148 (7th Cir.), required the prosecutor to present race-neutral explanations but then used evidence of differing treatment as one factor in the evaluation of the prosecutor's race-neutral explanations. In effect, evidence of disparate treatment became part of the determination of that

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[3] A brief survey of circuits reveals recent cases from almost every jurisdiction which do *not* require the trial judge to evaluate disparate treatment between similarly situated black and white jurors. For example, see *United States v. Pulgarin*, 955 F.2d 1 (1st Cir. 1992); *United States v. Stavroulakis*, 952 F.2d 686 (2d Cir. 1991); *United States v. Casper*, 956 F.2d 416 (3d Cir. 1992); *United States v. Hinojosa*, 958 F.2d 624 (5th Cir. 1992); *United States v. King*, 1992 WL 88555 (6th Cir.); *Williams v. Chrans*, 957 F.2d 487 (7th Cir. 1992); *United States v. Todd*, 1992 WL 85143 (8th Cir.); *United States v. Bishop*, 1992 WL 55078 (9th Cir.); *United States v. Johnson*, 941 F.2d 1102 (10th Cir. 1991).

prosecutor's credibility.[4] Georgia courts follow the overwhelming majority of state and circuit courts and recognize that "the only limitation newly placed upon the 'full peremptory character of the historic challenge' is a requirement of racial neutrality." *Gamble*, *supra* note 2, at 329; *see also*, *Foster v. State*, 258 Ga. 736 (1988).

At the *Batson* hearing in the present case, the State admitted that Petitioner established a prima facie case of discrimination and offered non-racial explanations for striking all jurors, not just the six black jurors. T. 309-319. Although Petitioner argues that similarly situated white jurors were treated differently from black jurors, the facts do not support this argument. Specifically, all of the jurors were struck because they were intimate friends with Petitioner or his family, because they were closely related to persons who had been arrested or prosecuted, or because the juror would not be able to impose a death sentence. Nine of the ten jurors struck were, in fact, similarly situated to each other. The only exception was Joseph Brandenburg, whom the prosecutor felt would not be able to understand the issues involved.

All of the non-racial explanations were offered to the trial judge. These reasons, however, were not blindly accepted. There is clear evidence that the trial judge conducted an independent evaluation of the prosecutor's stated explanations

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[4] Another similar example is found in *Stavroulakis*, *supra* note 3, which declared that the prosecutor's burden was simply to enunciate race-neutral explanations. The court, however, then used evidence of differing treatment in its evaluation of the credibility of the prosecutor.

for the challenges. Particularly, the trial court inquired into the final strike of Ms. Simmons and determined that the reason offered by the prosecutor was non-racially based. T. 323-327. In addition, the trial judge recognized that this prosecutor had no past history of racial strikes and therefore accepted the non-race explanations for the challenges. T. 327. The Georgia Supreme Court, in its decision below, recognized the discretion of the trial judge to determine these issues and affirmed Petitioner's conviction. Based upon the criteria established in *Batson* and its progeny, the testimony presented and the trial judge's determination of credibility, it is clear that no *Batson* violation occurred.

Since the prosecutor enunciated race-neutral explanations for the use of peremptory challenges and since the trial court independently evaluated those explanations, no *Batson* violation occurred in Petitioner's trial. In addition, there is no conflict in the circuits sufficient to compel action by this Court.

II. THE GEORGIA SUPREME COURT CONSTITUTIONALLY APPLIED THE DEPRAVITY OF MIND PROVISION OF THE GEORGIA DEATH PENALTY STATUTE AS THIS CASE LIES WELL WITHIN THE "CORE" OF CASES WHICH ALLOW A FINDING THAT THE MURDER WAS SUFFICIENTLY DEPRAVED SO THAT THE DEATH PENALTY MAY BE IMPOSED.

The death penalty was imposed in this case after the jury found that Petitioner's actions met a statutory aggravating circumstance listed at O.C.G.A. § 17-10-30 (b) (7).[5] In affirming the death penalty sentence, the Georgia Supreme Court found that the evidence presented at trial supported the jury's finding of both torture and depravity of mind. By affirming Petitioner's conviction, the Georgia Supreme Court did not abandon its narrow construction of Georgia's "depravity of mind" provision in O.C.G.A. § 17-10-30. This decision recognized that the murder committed by Petitioner fit within the core of cases which would sustain a death penalty conviction after a finding of an aggravating circumstance. In addition, the georgia Supreme Court's opinion fits within this Court's mandate that § (b) (7) be narrowly interpreted to limit the discretion of the factfinder.

A. *Legal Underpinnings of O.C.G.A. § 17-10-30 (b) (7)*

This Court, in *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), cautioned that the death penalty "could not be imposed

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[5] The full text of § (b) (7) reads:

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;"

under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Although a facial attack on Georgia's "depravity of mind" statute was rejected, *Gregg* mandated that, in light of the inherent risk of arbitrary or capricious results, the discretion of juries should be directed and limited with guidance by trial courts. Later, in *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court outlined the relevant limits to § (b) (7). First, the evidence must demonstrate that the offense was "outragiously or wantonly vile, horrible, or inhuman" because it involved "torture, depravity of mind, or an aggravated battery to the victim." *Id.*at 431. Second, "depravity of mind" must involve a mental state which led the murderer to commit torture or an aggravated battery on the victim. *Id.* Finally, *Godfrey*, interpreted "torture" to require evidence of serious physical abuse of the victim. *Id.*

Immediately following *Godfrey*, the Georgia Supreme Court carefully enunciated the requirements for a constitutional application of § (b) (7). *Hance v. State*, 245 Ga. 856, *cert. denied*, 449 U.S. 1067 (1980). A jury must find that the murder was outrageously or wantonly vile, horrible or inhuman and that it involved aggravated battery, or depravity of the mind, or torture. *Hance*, however, broadened the definition of torture enunciated in *Godfrey* based upon the recognition that Justice Stewart had developed the definition after consideration of solely

one Georgia case.[6] Since *Godfrey* and *Hance*, Georgia courts have expanded the definition of torture to include psychological elements as well.[7] The Eleventh Circuit, in *Burger v. Zant*, 718 F. 2d 979 (11th Cir. 1983), squarely addressed the question of how far to extend the definition of turture and concluded that both mental and physical elements could be constitutionally used to support a finding of torture.[8]

The factual elements which may constitutionally support a finding of depravity of mind have also been considered by the Georgia Supreme Court. In *Hance*, the Georgia court declared that evidence of torture or of an aggravated battery would sustain a finding of depravity of mind. Similarly, mutilation, serious disfigurement, or sexual molestation after death may support a finding of depravity of mind. Finally, the age and physical

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[6] This limit was pulled exclusively from *Blake v. State*, 239 Ga. 292 (1977).

[7] In a line of cases beginning with *Hance v. State*, *supra*, the Georgia Supreme Court has recognized that psychological torture would support a finding of "torture." *See, e.g., Phillips v. State*, 250 Ga. 336, 340 (1982) ("Torture may be found where the victim is subjected to serious physical, sexual, or **psychological abuse** before death."); *Brown v. State*, 247 Ga. 298 (1981) (serious torture); *Dampier v. State*, 245 Ga. 882, *cert. denied*, 449 U.S. 938 (1980) (evidence of severe psychological abuse resulting in mental anguish in anticipation of physical harm may amount to torture); *Hance*, *supra* at 861 ("Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e. torture of the victim) . . . ").

[8] The court specifically stated: "We see no basis for concluding that the definition of "torture" applied by the Georgia courts violates substantive federal constitutional guarantees." *Burger* at 986.

characteristics of the victim may be considered in a finding of depravity of mind. *Id.* at 862.[9]

B. *Application of O.C.G.A. § 17-10-30 (b) (7)*

In the present case, Petitioner was not denied any substantive constitutional right by the trial court or the Georgia Supreme Court. based upon the evidence presented at trial, the jury found that the murder was wantonly vile, horrible, or inhuman. In addition, the jury found evidence of both torture and depravity of mind. During its careful review of the sentence, the Georgia Supreme Court found that the verdict, while not in perfect statutory form, included all the necessary elements for a constitutional application of the death penalty. Namely, the Georgia court recognized that all three of the attributes were present and that two of the factual elements were present (i.e. torture and depravity of mind). The court also concluded that the evidence presented at trial supported the jury verdict.[10]

In reaching this conclusion the Georgia Supreme Court considered evidence of mental torture demonstrated through a

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[9] *See also, Burger v. Zant*, 718 F.2d 979, 984 n.4 (11th Cir. 1983); *Phillips v. State*, 250 Ga. 336, 340 n.3 (1982).

[10] Specifically, it found that the evidence "show[ed] a continuing pattern of abuse of the victim by [Petitioner], culminating in the death of the victim because he was playing with a toy. [Petitioner] chased down and shot his ten-year-old son as the boy begged him not to shoot him. Afterwards, [Petitioner] first dismissed the significance of his act by claiming, 'shit happens,' then sought to justify the act first as a lesson in discipline, and then as an act of self-defense." *Hall v. State*, 1991 WL 255007.

continuing pattern of abuse as well as the fact that the victim was begging Petitioner not to shoot him. The court also found that the fact that the victim was only ten-years-old, that the murder was committed because the boy was playing with a toy and that the Petitioner justified his actions as a "lesson" after telling a neighbor "shit happens" all supported the jury's finding of depravity of mind.

The application of the death penalty under O.C.G.A. § 17-10-30 (b) (7) in this case is well within the limits set by this Court in *Gregg* and *Godfrey*. The facts of this case place it squarely within that "core" of cases which allow a finding that the murder was sufficiently depraved so that the death penalty may be imposed. For example, this case is very similar to *Harris v. State*, 237 Ga. 718 (1976), *cert. denied*, 431 U.S. 933 (1977), which was mentioned with approval by this Court in *Godfrey*. In *Harris*, the defendant had pulled a gun on the victim at a mall, made her drive to a deserted area of the parking lot, had a short conversation with her during which the victim begged for her life and then shot her two times in the back of the head. despite the lack of any physical torture, the defendant's death sentence under § (b) (7) was affirmed because the murder fit within the "core" of death penalty convictions. Similarly, in *Dampier, supra* note 7, the defendant's § (b) (7) conviction was affirmed based on the fact that the victim was abducted, unthreatening and begged for his life for five minutes before he was killed.

Harris and Dampier clearly demonstrate that Petitioner's case fits within the "core" of death penalty convictions. Like those cases, the victim was unthreatening, begged for his life, and experienced continuing psychological torture from Petitioner. In addition, there is further evidence of Petitioner's depravity of mind from his conduct during and after the murder and from the fact that the victim was very young. The only distinguishing characteristic between this case and other "core" cases lies in the fact that this murder involved a domestic dispute. The Georgia Supreme Court recognized in *Gilreath v. State*, 247 Ga. 814 (1981), *cert. denied*, 456 U.S. 984 (1982), however, that domestic murders may fit within the "core" of cases which demand the death penalty.[11]

In light of the factual evidence presented at trial as well as the limiting construction placed by the Georgia Supreme Court on § (b) (7) convictions, no infringement of Petitioner's constitutional rights occurred in this case. Similarly, the Georgia courts have not deviated from this Courts mandate to limit the application of the death penalty to specific "core" cases, and there is no conflict between Georgia and other circuits in the interpretation of the "depravity of mind" provision.

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[11] The Georgia Supreme Court stated in *Gilreath* that "[s]ome of the most vicious homicides have been perpetrated by family members against one another. Since January 1, 1970, juries throughout the state have given the death penalty in six domestic murder cases . . . Thus, domestic murders are 'a capriciously selected group of offenders' within the proscription of[*Gregg*]. *Id.* at 841.

III. NO CONFLICT EXISTS BETWEEN THE GEORGIA SUPREME COURT AND THIS COURT AS THE GEORGIA COURT DID NOT AFFIRM THE DEATH SENTENCE ON GROUNDS OTHER THAN THOSE RELIED UPON BY THE JURY IN THIS CASE.

The Georgia Supreme Court affirmed Hall's death penalty conviction on the grounds that the evidence supported a finding of both mental torture and depravity of mind. Petitioner argues that the Georgia Supreme Court impermissibly affirmed the conviction based upon evidence other than that which the jury considered, however, this argument both misconstrues Georgia law on depravity of mind and misreads the jury verdict.

It is true that in Georgia the jury has the sole discretion to impose the death penalty once one of the aggravating circumstances is found. *See*, O.C.G.A. §§ 17-5-30, 17-5-31. This Court acknowledged this in *Gregg*, 428 U.S. 153, 166 (1976). Further, this Court stated in *Presnell v. Georgia*, 439 U.S. 14 (1978), that a defendant was entitled, under due process of law, to have a conviction reviewed on the facts as determined at the trial level. In *Presnell* the Georgia Supreme Court had affirmed a death penalty conviction on the grounds that the evidence supported a finding of forcible rape which could be used as the basis of a § (b) (2) aggravating circumstance. The jury, however, had found that sodomy was the basis of the § (b) (2) verdict. This Court reversed based upon the Georgia Court's independent review of the evidence.

Since *Presnell*, the Georgia Supreme Court has heeded the warning by this Court and has determined that it cannot independently review the evidence and thereby remedy a flawed jury verdict. This stance was recently reaffiremed in *Black v. State*, 261 Ga. 719 (1991), where the jury verdict failed to explicitly find that the murder was "outrageously or wantonly vile, horrible or inhuman."[12] In light of this failure to include any part of the first portion of the § (b) (7) aggravating circumstance, the Georgia Supreme Court overturned the death penalty conviction. *See also, Jarrell v. State*, 261 Ga. 880 (1991); *Patrick v. State*, 247 Ga. 168 (1981). [13]

This case, however, does not contain the same error that was found in *Presnell*. Specifically, the Georgia Supreme Court did not independently review the evidence and correct a flawed jury verdict. The verdict in this case, while not in perfect statutory form, was sufficiently clear to reveal the jury's intent. *See, Romine v. State*, 251 Ga. 208 (1983). The verdict read:

> "We the jury find the folowing aggravating circumstances to exist beyond a reasonable doubt: wantonly vile, depravity of mind, horrible, inhuman in that it involved torture."

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[12] The jury's verdict in *Black* stated:

"We, the jury, recommend that the death penalty be imposed, and we find the following statutory aggravating circumstance: Torture [;] Aggravated Battery."

[13] *Compare, Brown v. State*, 254 Ga. 83, *cert. denied* 474 U.S. 865 (1985). The Georgia Supreme Court unwittingly had gone outside the record to affirm the conviction at 247 Ga. 298, but in this later case corrected its error and determined that there was enough evidence in the record itself to support the jury's finding.

As was mentioned previously, under *Godfrey* and georgia precedent, in order for § (b) (7) to be constitutionally applied, a jury must find, first, that the murder was outrageously or wantonly vile, horrible, or inhuman and, second, that the murder involved aggravated battery, *or* torture, *or* depravity of the mind. The evidence "must be sufficient to satisfy the first major component of the statutory aggravating circumstances and at least one sub-part of the second component." *Hance* at 861. As was recognized by Justice Weltner in his concurring opinion, the "jury found *two* of the three possible factual elements and *three* of the attributes, as specified in OCGA § 17-10-30 (b) (7). [Emphasis in original]." *Hall v. State*, 1991 WL 255007 (Weltner, J., concurring specially).

Petitioner asserts that, in light of the pattern jury instructions, the Georgia Supreme Court must have relied upon evidence other than that considered by the jury; however, this misconstrues the jury instruction given in this case as well as the opinion of the Georgia Supreme Court. Under the standard jury instructions given[14] the jury was authorized to consider

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[14] The standard jury instruction on depravity of mind reads:

"I charge you that depravity of mind is a reflection of an utterly corupt, perverted or immoral state of mind. In determining whether or not the offense of murder in this case involved depravity of mind on the part of the defendant, you may consider **the age and physical characteristics of the victim** and you may consider **the actions of the defendant prior to and after the commission of the murder**. In order to find that the offense of murder involved depravity of mind, you must find that the defendant, as a result of his utter corruption, perversion or immorality, committed aggravated battery or torture upon a living person, or subjected the body of a deceased victim to mutilation or serious disfigurement or sexual abuse."

the age and physical characteristics of the victim as well as any actions by the defendant prior to and after the murder. This evidence was, in fact, the evidence used by the Georgia Supreme Court in affirming the verdict. Justice Smith, writing for the majority, found that the evidence was sufficient to support a finding of both mental torture and depravity of mind. In addition, Justice Weltner wrote that consideration of physical torture was irrelevant since the evidence was sufficient to support the jury's finding of depravity of mind based upon evidence before the jury of mental torture. No justice in the majority considered any evidence outside the record, and the majority's affirmance of the death penalty was consistent with both the evidence considered by the jury and the verdict itself.

No conflict exists between the Georgia Supreme Court's decision and prior decisions of this Court since Petitioner's death sentence was affirmed on evidence which was within the record and was considered by the jury. For this reason, there is no ground for this Court to exercise its discretionary jurisdiction.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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